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WAR POWERS TEST BY SUPREME COURT WEIGHED IN SENATE

SHULTZ WANTS A DECISION

Urges Congress and Reagan to Seek 'Common Sense' Solution to Conflict

By BERNARD GWERTZMAN

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WASHINGTON, March 28 — Some Senate leaders and White House officials have discussed petitioning the Supreme Court to rule on the constitutionality of the War Powers Act in the aftermath of the Lebanon crisis, a Republican senator said today.

Secretary of State George P. Shultz, who has been highly critical of the limits the act sets on the President's role as Commander in Chief, today cautiously approved the idea of asking the Court to take up the question. But in testimony before a Senate subcommittee he suggested it might be better for Congress and the Administration to work out "a common sense" solution.

'Extremely Important Issue'

The War Powers Act, which was approved in 1973 after the United States had ended its involvement in the Vietnam War, has again emerged as an issue between Congress and the executive branch because of Congressional efforts to use it as a vehicle to limit the Administration's ability to keep American troops in Lebanon.

Testifying before the Senate Appropriations Subcommittee on Commerce, Justice, State and Judiciary, Mr. Shultz said, "How the Congress and the executive branch should interact in the field of foreign affairs, particularly of matters of great moment, is an extremely important issue and it has moved in recent years very much in the Congressional direction."

Threat Expected to Grow

"It ought to be thoroughly discussed, preferably in an atmosphere not having to do with some particular action we're struggling with, but on a more general plane," Mr. Shultz said. "I would welcome a more thorough review, including getting the lawyers into the act, and so on, because I think myself that we're getting off the track."

Mr. Shultz repeated before the committee his opposition to the bill to move the American Embassy in Israel to Jerusalem, and appealed for \$10.5 million in emergency funds to augment security at American installations, particularly in the Middle East.

Noting the bombings and assassinations of the last year that have led to more than 300 American deaths, Mr. Shultz said, "The most recent intelligence estimates offer no reason to believe that this threat will diminish." He said the Administration must assume the threat to Americans will increase.

Most of Mr. Shultz's discussion over the War Powers Act was with Senator Arlen Specter, Republican of Pennsylvania, who has publicly taken the view that no American forces should be engaged in combat except through a Congressional declaration of war. At an earlier hearing, Mr. Specter elicited from Mr. Shultz the statement that both the Korean and Vietnam conflicts were "wars."

Mr. Specter argued that Presidents engaged American troops in those "wars" without seeking and receiving the necessary Congressional declarations of war. The War Powers Act was an attempt to get around the declaration of war issue by prohibiting the President from keeping United States troops in combat situations for more than 90 days unless Congress declares war or otherwise approves use of the troops.

Last October, Congress approved a resolution, based on the act, authorizing the marines in Lebanon to remain for 18 months, but President Reagan in a statement indicated he did not accept the Congressional limits.

Test Case Is Discussed

Mr. Specter said "there has been some discussion between the Senate leadership and the White House to formulate a test case that would go to the Supreme Court of the United States which would decide this question in a nonconfrontational context."

He said he agreed with Mr. Shultz on trying to work out differences on the issue when there is no specific crisis. For instance, he said if the President refused to withdraw troops from overseas after 90 days, as required by the War Powers Act, Congress would have no other action open than to cut off funds, something it would be unlikely to do if American troops would suffer.

Any court action at that time would undoubtedly take too long, he said.

Later, in a telephone interview, Mr. Specter said he and the majority leader, Howard H. Baker Jr., had met with Fred F. Fielding, the White House counsel, and lawyers from the Justice Department to discuss a Supreme Court test. A spokesman for the majority leader confirmed the meetings, saying that Mr. Baker agreed with the Administration that the language in the act needed to be changed because constant confrontation between the two branches served no useful purpose.

Major Problem Is Noted

Mr. Specter said that so far the Justice Department was opposing the test. Moreover, Mr. Specter, a former district attorney from Philadelphia, noted a major legal problem.

The Supreme Court, he and other lawyers said, has traditionally ruled that it and other Federal courts have no constitutional authority to provide advisory opinions to other branches of government or to anybody else.

Under the Constitution, the jurisdiction of Federal courts is limited to deciding "cases" and "controversies," which they said have traditionally been interpreted to mean real disputes with a factual content as opposed to abstract legal disputes.

Nevertheless, Mr. Specter said he believed that if the President and Congressional leaders made a direct appeal to the Supreme Court to take up the War Powers Act, it would do so.

Mr. Shultz has argued previously that the continuing debate in Congress on whether the marines in Lebanon should have remained there, and what their mission was, contributed to the inability of the United States to bring about a diplomatic solution in Lebanon and to the eventual withdrawal of the marines in what was perceived as a setback for the United States.

"It seems to me," Mr. Shultz said, "that if you say the President is the Commander in Chief and then you have a piece of legislation that says he can be put into a position by the Congress that if the Congress does nothing then he must move forces within some period of days, how can you say he is the Commander in Chief under those circumstances."

"There has to be a capacity for decisiveness under certain circumstances," he said. "There has to be an ability to go along without being constantly undercut or surrounded by so many conditions that you don't have room for maneuver."

In his formal presentation, Mr. Shultz asked for \$10.5 million in emergency allocations to increase security at American installations overseas.